

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TAX ANALYSTS
6830 North Fairfax Drive
Arlington, VA 22213,

Plaintiff,

v.

INTERNAL REVENUE SERVICE
1111 Constitution Avenue, NW
Washington, DC 20224,

Defendant.

CASE NUMBER 1:05CV00934

No. — JUDGE: Ellen Segal Huvelle

DECK TYPE: FOIA/Privacy Act

DATE STAMP: 05/10/2005

COMPLAINT FOR DISCLOSURE OF CHIEF COUNSEL ADVICE
WITHHELD FROM DISCLOSURE BY THE INTERNAL REVENUE
SERVICE IN VIOLATION OF 26 U.S.C. (INTERNAL REVENUE
CODE) § 6110, AND RELATED DOCUMENTS WITHHELD
FROM DISCLOSURE BY THE INTERNAL REVENUE
SERVICE IN VIOLATION OF THE FREEDOM OF INFORMATION ACT

1. Plaintiff Tax Analysts seeks disclosure by defendant Internal Revenue Service ("IRS") of (a) Chief Counsel Advice memoranda ("CCA") unlawfully withheld from public disclosure in violation of § 6110 of the United States Internal Revenue Code ("IRC"), and (b) documents and portions of documents related to such withholding, unlawfully withheld from public disclosure in violation of the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA").

JURISDICTION AND VENUE

2. This court has jurisdiction of this action under IRC § 6110(f)(4)(A), 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. Venue lies in this district pursuant to 5 U.S.C. § 1391(e).

PARTIES

3. Tax Analysts is a nonprofit corporation organized and existing under the laws of the District of Columbia. Tax Analysts is qualified as a charitable and educational organization described in IRC § 501(c)(3).

(a) Tax Analysts' primary public education function is the publication and dissemination to the public in the United States and abroad of news and other information concerning the enactment and administration of the tax laws of the United States, the several states and other countries, the adjudication of tax cases by courts and other tribunals of the United States, the several states and other countries, and other subjects relating to taxation.

(b) From its founding, Tax Analysts has made one of its primary missions and purposes the placing in the public domain, for the benefit of the American taxpaying public, of IRS' internal agency working law. Through litigation under public information disclosure laws and pursuit of its First Amendment rights to petition the Congress of the United States, Tax Analysts has succeeded in forcing IRS to place in the public domain, inter alia, such IRS national Office of Chief Counsel ("OCC") agency working law documents as private letter rulings ("LTRs"), technical advice memoranda ("TAMs"), general counsel memoranda ("GCMs"), actions on decision ("AODs"), technical memoranda ("TMs"), field service advice memoranda ("FSAs"), technical assistance to the field and to program managers ("TAs"), CCA, and rulings denying and rulings revoking

organizations' charitable tax exempt status.

4. Defendant IRS is an agency of the United States government with its headquarters in Washington, DC, in this judicial district.

GOVERNING LAW

5. IRC § 6110 provides for disclosure of IRS written determinations, which include LTRs, TAMs and CCA. Congress enacted the provisions for disclosure of LTRs and TAMs in 1976. Congress enacted the provisions for disclosure of CCA, IRC § 6110(i), in 1997, as § 3509 of Pub. L. 105-206.

6. In IRC § 6110(i)(1), Congress defines CCA as broadly as possible to include "any written advice or instruction" that is issued by OCC, located at IRS headquarters in Washington, DC, to the "field," i.e., IRS and OCC offices and employees outside of the national office, and which conveys

(a) "any legal interpretation of a revenue provision," defined as any "existing or former internal revenue law, regulation, revenue ruling, revenue procedure, other published or unpublished guidance, or tax treaty, either in general or as applied to specific taxpayers or group of specific taxpayers."

(b) "any" IRS or OCC "position or policy concerning a revenue provision" or

(c) "any legal interpretation" of state, foreign or other federal law relating to taxation.

7. The FOIA provides for disclosure of agency records within 20 working days of an agency's receipt of a properly framed request.

8. The FOIA does not apply to documents whose disclosure IRC § 6110 provides for, and vice-versa.

**Requests for Disclosure
at Issue in This Case**

9. Soon after the effective date of IRC § 6110(i) in 1998, IRS began releasing CCA to the public as the statute requires.

10. Beginning in 2003, in violation of § 6110(i), IRS began restricting the release of CCA. See ¶¶ 11-12, *infra*.

11. In July 2003 IRS issued a Chief Counsel notice, Notice CC-2003-022 (July 1, 2003), issued over the signature of Deborah A. Butler, IRS Associate Chief Counsel (Procedure and Administration). Pursuant to that Notice, IRS began withholding from public disclosure CCA issued with respect to cases pending ("docketed") in the United States Tax Court. Tax Analysts submitted several requests for disclosure of CCA so withheld. IRS denied those requests and Tax Analysts filed suit in this court to compel their disclosure. Tax Analysts v. IRS, No. 1:04CV1050(EGS). That action is pending.

12. In February 2004 IRS issued Notice CC-2004-012 (February 19, 2004), also over the signature of Deborah A. Butler, IRS Associate Chief Counsel (Procedure and Administration). This Notice further restricted the release of CCA to the public. It provided that (a) CCA transmitted as legal advice to the field, but "that can be prepared in less than two hours" ("two-hour CCA") and (b) CCA which transmitted legal advice to the field by the transmittal of a pre-existing memorandum, (c) "need not be released to the public." Notice

CC-2004-022, "Q&A" Nos. 12, 13, 15, 19. Nothing in § 6110(i), or any other provision of law, permits such withholding.

13. On April 14, 2004, Tax Analysts, by counsel, wrote a letter to Deborah A. Butler. In the letter Tax Analysts requested information about Notice CC-2004-022, specifically:

(a) what provision or provisions of law or regulation, if any, immunize two-hour CCA from public disclosure under § 6110(i)?

(b) how is the "two-hour" rule administered?

(c) what is the basis for withholding from disclosure as CCA pre-existing memoranda provided as legal advice to the field?

14. Ms. Butler never has responded to Tax Analysts' letter of April 14, 2004.

15. In light of Ms. Butler's epistolary silence, on June 7, 2004, Tax Analysts submitted to IRS requests for disclosure under § 6110 of (a) all two-hour CCA withheld from disclosure and (b) all CCA withheld from disclosure on the ground that the document transmitted was a pre-existing legal memorandum. In the same letter, on June 7, 2004, Tax Analysts requested under FOIA that IRS release (c) all IRS agency records in existence before February 19, 2004, that "include descriptions of, or references to, or are precursors of the provisions of CC Notice 2004-022, Q&A Nos. 10, 12, 13, 15, 16 and 19," and (d) all IRS agency records, besides Notice CC-2004-022, "that provide guidance or instructions to attorneys of OCC [IRS' Office of Chief Counsel] on how to carry out the provisions of Q&A Nos. 10, 12, 13, 15, 16

and 19 of that Notice."

16. IRS' only responses to Tax Analysts' requests submitted on June 7, 2004, have been

(a) with respect to the § 6110(i) requests, (1) a letter dated July 12, 2004, stating that the request "raises several issues that we are investigating" and that "[a]t this time we are not in a position to advise as to a timetable for response," and (2) an e-mail, dated February 4, 2005, stating that IRS would begin consideration of the request only after it completed processing another Tax Analysts request, a date expected to be September 30, 2005, and

(b) with respect to the FOIA requests, letters from IRS' Headquarters ("HQ") FOIA office dated June 29, 2004, November 15, 2004, December 14, 2004, January 14, 2005, February 22, 2005, March 21, 2005, and April 21, 2005, asking for additional time to respond.

17. On April 8, 2005, Tax Analysts submitted to IRS follow-up requests for the same categories of documents requested on June 7, 2004, prepared or issued up to the date of IRS' receipt of the April 8, 2005, requests. Under 5 U.S.C. § 552(a)(6)(A), IRS was required to respond to Tax Analysts' April 8, 2005, FOIA request on or before May 6, 2005. In its letter of April 21, 2005, ¶ 16(b), supra, IRS characterized Tax Analysts' April 8, 2005, request as an "amend[ment]" to the June 7, 2004, request and declared that it would "try to respond to the FOIA portion of the [amended] request by May 23, 2005."

18. IRS' failure and refusal to make available to Tax Analysts and to the public "two-hour" CCA and CCA that transmit a pre-existing memorandum are in violation of IRC § 6110(a) and 26 CFR § 301.6110-1.

19. IRS' failure to respond to Tax Analysts' June 7, 2004, and April 8, 2005, FOIA requests are in violation of the FOIA, 5 U.S.C. § 552(a)(6)(A).

20. Tax Analysts has exhausted its administrative remedies.

REQUESTS FOR RELIEF

21. Tax Analysts requests that this court:

(a) Pursuant to IRC § 6110(f)(4)(A), order IRS to follow the procedures mandated by IRC § 6110(i)(4) and release to Tax Analysts and to the public all CCA withheld from disclosure pursuant to Notice CC-2004-022, as described in ¶¶ 12-18 supra.

(b) Pursuant to the FOIA, 5 U.S.C. § 552(a)(3), enjoin IRS from continuing to withhold and order IRS to release to Tax Analysts and to the public the documents Tax Analysts requested under the FOIA on June 7, 2004, and April 8, 2005, as described in ¶¶ 12-19 supra.

(c) Pursuant to IRC § 6110(f)(4)(A) and 5 U.S.C. § 552(a)(4), award Tax Analysts the reasonable attorney's fees and litigation expenses incurred in prosecuting this action.

Respectfully submitted,

William A. Dobrovir / CFH

WILLIAM A. DOBROVIR
D.C. Bar No. 030148
P.O. Box 198
Sperryville, VA 22740-0198
(540) 987-9114

Cornish F. Hitchcock

CORNISH F. HITCHCOCK
D.C. Bar No. 238824
Suite 350
5301 Wisconsin Avenue, N.W.
Washington, D.C. 20015
(202) 364-1050

Attorneys for Plaintiff